STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 NORTH FRENCH STREET, 11TH FLOOR
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON
CHIEF MAGISTRATE

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LEGAL MEMORANDUM 84-117

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: FEBRUARY 23, 1984

RE: CARELESS DRIVING AND DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR WHEN CHARGED AS A RESULT OF A SINGLE INCIDENT

Hypothetical

John Doe was involved in an automobile accident and was arrested by the Delaware State Police on charges of 1) Driving while under the influence of intoxicating liquor[1] and 2) Careless driving.[2] Doe elects to be tried in a Justice of the Peace Court and enters a plea of not guilty to the charge of driving while

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[1] 21 Del.C., §4177(a) and (b) state as follows:
"(a) No person shall drive, operate or have in actual physical control a vehicle, an off-highway vehicle, a moped or a bicycle while under the influence of intoxicating liquor or of any drug or any combination of drugs and/or intoxicating liquor.
(b) Any person charged under subsection (a) of this section whose blood alcohol concentration is one tenth of 1% or more by weight as shown by a chemical analysis of a blood, breath or urine sample taken within 4 hours of the alleged offense shall be guilty of violating subsection (a) of this section. This provision shall not preclude a conviction based on other admissible evidence."

[2] 21 Del.C., §4176(a) states as follows:
"(a) Whoever operates a vehicle in a careless or imprudent manner, or without due regard for road, weather and traffic conditions then existing, shall be guilty of careless driving."

under the influence of intoxicating liquor, but he enters a plea of guilty to the charge of careless driving. He is fined $25 plus costs plus a VCF assessment. A trial date is set with regard to the DUI charge.

The DUI trial date arrives. Doe is represented by counsel. Prior to the trial, Doe's counsel moves to dismiss the DUI charge on the following ground: That after Doe entered a plea of guilty to the careless driving charge, prosecution of the DUI charge would subject Doe to being "twice put in jeopardy of life or limb" in violation of the Fifth Amendment of the United States Constitution and Article I, Section 8 of the Delaware Constitution. You are the presiding Justice of the Peace and you have to determine whether prosecution of the DUI charge constitutes multiple prosecution of the same offense prohibited by the Double Jeopardy Clause of the State and Federal Constitutions. How would you decide this issue?

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Recently this issue came before Chief Judge Robert Thompson of the Family Court of Delaware in the case of State v. Mullikin, Fam.Ct., 455 A.2d 371 (1982). There, Chief Judge Thompson denied the offender's motion to dismiss, stating as follows:

> "Double jeopardy . . . is forbidden by the fifth amendment of the Federal Constitution and Article I, Section 8 of the Delaware Constitution . . . By virtue of the due process clause of the fourteenth amendment of the Federal Constitution, the fifth amendment guarantee against double jeopardy is enforceable against the states. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Although these constitutional provisions forbid a state from placing an individual twice in jeopardy for the same criminal offense, they do not prohibit multiple prosecution of the same criminal act that constitutes two or more separate criminal offenses.

Vincent v. State, Del.Supr., 256 A.2d 268 (1969); State v. Hamilton, Del.Super., 318 A.2d 624 (1974). Thus, if the alleged acts of the respondent gave rise to separate statutory offenses, the respondent's double jeopardy claim fails.

In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Supreme Court announced that the governing test to determine if there are in fact and law two separate offenses is whether each provision requires proof of an additional fact which the other does not. Driving under the influence, as defined in 21 Del.C., §4177, is established simply if the State can prove two elements: (1) operation of the vehicle with (2) the prohibited blood alcohol concentration. Coxe v. State, Del.Supr., 281 A.2d 606 (1971). In contrast, a prosecution for careless driving, in violation of 21 Del.C., §4176(a), focuses on the manner in which the accused drives. Although evidence that the defendant operated a vehicle while intoxicated is absolutely essential to support a conviction for driving under the influence, see State v. Heitter, Del.Supr., 203 A.2d 69 (1964), proof of this fact alone does not warrant a conviction for careless driving. State v. Licari, Conn.Supr., 132 Conn. 220, 43 A.2d 450 (1945); State v. Mahalik, Conn. Circ.Ct., 22 Conn.Sup. 400, 173 A.2d 897 (1961). Clearly, each provision requires proof of an additional fact which the other does not and constitutes a separate criminal offense. As a result, careless driving is not an 'included' offense of drunk driving, because an included offense, defined in 11 Del.C., §206(b), is established by proof of the same or less than all the facts required to establish the commission of the offense charged. See State v. Roenicke, N.J.Super., 174 N.J.Super., 513, 417 A.2d 54 (1980).

The current prosecution of the driving under the influence charge does not subject the respondent to double jeopardy. Thus, . . . the motion to dismiss fails."

The Mullikin decision is important because it points out that a driving incident can result in the bringing of two or more separate traffic charges each of which grew out of one incident. There is obviously no requirement that the arresting police officer pick out the best charge relating to the incident if, in fact, multiple charges are appropriate.

The Mullikin decision is also important because it impliedly holds that careless driving is not a lesser included offense of driving while under the influence. Thus, if a defendant is charged with DUI, you cannot find the defendant not guilty of DUI but guilty of careless driving when the DUI charge was the only one brought against the defendant. The same holds true for reckless driving and inattentive driving.[3] However, the above is not meant to preclude a defendant from entering into a plea bargain with the State whereby a DUI charge is dropped with the understanding that the defendant will plea guilty to a charge of reckless, careless or inattentive driving so long as facts exist which will support such a plea.

NAB:pn

cc: The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
Eugene M. Hall, Esquire
Henry N. Herndon, Jr., Esq., Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
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[3]This is not to say that there may never be a traffic offense which is a lesser included offense of another traffic offense. We have already seen that failure to have a license in his possession may be a lesser included offense of driving during revocation. State v. Moore, Del.Super., 269 A.2d 242 (1970); Legal Memorandum 82-80 (Revised), dated October 15, 1982, Driving While License Is Suspended Or Revoked. And, we have seen that careless driving may be a lesser included offense of reckless driving. People v. Chapman, Colo.Supr., 557 P.2d 1211 (1977); Legal Memorandum 83-109, dated May 5, 1983, Reckless And Careless Driving.